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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/893,336	06/27/2001	Daniel W. Doll	1082-496	1135

7590 06/08/2004  
Joseph A. Walkowski  
Traskbitt, PC  
P. O. Box 2550  
Salt Lake City,, UT 84110

EXAMINER

MILLER, EDWARD A

ART UNIT	PAPER NUMBER
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3641

DATE MAILED: 06/08/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/893,336

Applicant(s)

DOLL ET AL.

Examiner

Edward A. Miller

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 18 March 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-3, 5-19 and 21-48 is/are pending in the application.
- 4a) Of the above claim(s) 18, 23, 26 and 30 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3, 5-17, 19, 21, 22, 24, 25, 27-29 and 31-48 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                        | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)    | Paper No(s)/Mail Date. _____  |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                                    |

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1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114.

Applicant's submission filed on March 18, 2004 has been entered.

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. The elected species remains as before.

4. Claims 1-17, 19-22, 24, 25, 27-29 and 31-48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Otani et al. '969 in view of Aubert et al. '668, Shepherd '000, Holt et al. German 37 44 680 A1, German 100,522, French 465,082 and French 349,635.

Otani et al. teach the basic invention of melt cast explosives with dinitro aromatics, oxidizer, aluminum metal fuel, etc. In view of Aubert et al., Shepherd, and the German and French patent documents, variation of the various notoriously well known additives, amounts and so forth would have been obvious. In particular, note French '082 which in lines 16-21, teaches the combination of aluminum metal, nitrated aromatic hydrocarbons, and ammonium perchlorate. Further, note German '680, which teaches on page 4, in a list, numerous aromatic, including phenyl ether derivatives, including various mono- and di-nitro anisole compounds. [Methoxybenzene and methyl phenyl ether are different names for the same compound, anisole.] These are then used in various mixtures in the examples on pages 8-10.

Note that the broad claim recitations read on many and various aromatics, requiring only some [unstated, even minor] amount of a mono or dinitro phenyl alkyl ether, but which in view of the "comprising" claim scope, may be combined with even a major amount of TNT, which is much

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broader than the claims previously were. as taught in the references, and that "oxidizer" of the broad claims reads on various oxidizers, including organic ones such as TNAZ of Aubert et al. or HMX and RDX, e.g. Further, Shepherd at col. 4, lines 5-6 suggests DNT, and at lines 14-18 following, that the amounts may be in the general range claimed by applicants. It is well settled that optimizing a result effective variable is well within the expected ability of a person or ordinary skill in the subject art. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980), *In re Aller*, 220 F.2d 454, 105 USPQ 233 (CCPA 1955).

Dinitroanisole is a notoriously well known dinitro-aromatic, but proper claims limited thereto, e.g., requiring such and of reasonable breadth, could be found allowable upon demonstration of unexpected results or upon convincing argument.

The case of obviousness also exists with claims defined by results or properties, as the properties or results must follow from the recited material claim limitations. The results are inherent in the compositions. Where the product appears to be the same or only slightly different, the properties recited would appear to be inherent. The Office does not have testing facilities to determine such. The burden falls on applicant to show that the prior art products do not necessarily or inherently possess the claimed properties. *In re Thorpe*, 777 F.2d 695, 697, 227 USPQ 964, 966; *In re Fitzgerald*, 619 F.2d 67, 70, 205 USPQ 594, 596; *In re Best*, 562 F.2d 1252, 1255; 195 USPQ 430, 433-434; *In re Brown*, 459 F.2d 531, 173 USPQ 685.

5. The submitted terminal disclaimers are effective to overcome the previous rejections for obviousness type double patenting.


6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Edward A. Miller whose telephone number is (703) 306-4163. The examiner can normally be reached on Monday-Thursday.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Carone can be reached on (703) 306-4198. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Miller/em  
June 1, 2004



**EDWARD A. MILLER**  
**PRIMARY EXAMINER**